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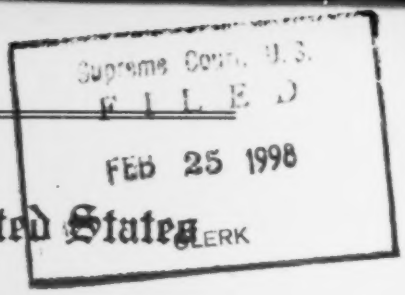

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHURCH OF SCIENTOLOGY INTERNATIONAL; BOWLES & MOXON; AND CHURCH OF SCIENTOLOGY OF ILLINOIS,

Petitioners,

v.

CULT AWARENESS NETWORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The brief of respondent Cult Awareness Network ("CAN") in opposition to the petition for writ of certiorari avoids the important constitutional issue the petition raises, and instead, makes much of the procedural posture of the case, arguing that because the question presented arises in the context of a motion to dismiss, the Court is required to deny the petition. CAN, however, misrepresents the true nature and significance of the procedural posture of the case, which, in fact, provides a firm basis for the Court's jurisdiction and review of the question presented. The instant petition seeks review of the only federal issue in this case, a clearly and starkly presented question of constitutional law that was specifically addressed and finally determined by the highest state court in Illinois, and which if reversed would be preclusive of any further litigation in this action. Based on this procedural posture, the Court without doubt has jurisdiction to review the critical and potentially decisive First Amendment issue raised here – whether Illinois may define its special injury requirement for the tort of malicious prosecution to include the coordination and encouragement of a series of lawsuits challenging discriminatory practices when relevant decisions of the Court have held that such activities are protected under the First Amendment to the Constitution of the United States. Indeed, it is ironic that in a case where CAN alleges it has been the victim of vexatious litigation, it is asking the Court to defer ruling on an issue that could resolve the case on legal grounds, and require instead that the parties first proceed to trial and litigate a claim that will necessitate voluminous discovery and consume numerous energy, time, and judicial resources, which may all be for naught.

1. Respondent's argument that the Court lacks jurisdiction to review the First Amendment issue raised here mischaracterizes both the decision of Supreme Court of Illinois and the final judgment rule.

a. Contrary to respondent's contention, the Supreme Court of Illinois directly, decisively, and finally determined the First Amendment issue petitioners raise. As set forth in detail in the Petition, petitioners moved to dismiss respondent's complaint for failure to state a claim for conspiracy to engage in malicious prosecution, arguing, among other grounds, that the complaint failed to allege sufficient facts to satisfy Illinois' special damages requirement under existing Illinois law. (Pet. 5-9.)[1/] Petitioners further argued that even if the allegations of the complaint were true and they coordinated the cases underlying CAN's conspiracy claim and provided counsel and assistance to challenge a pattern and practice of discrimination, such actions were protected First Amendment activities under the Court's *Button* line of cases,[2/] and thus could not constitute special damages under Illinois malicious prosecution law. (*Id.*) The Supreme Court of Illinois, however, specifically rejected petitioners' First Amendment argument and expanded Illinois' definition of special damages. As a matter of law, the court held that Illinois' special injury requirement for malicious prosecution cases could be met where a defendant has coordinated and encouraged a series of lawsuits challenging discriminatory practices. (16a-18a.) Thus, although the court

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1/ References to "(Pet. __)" are to the pages of the Petition. References to "(__a)" are to the pages of the appendix to the Petition. References to "(Opp. __)" are to the pages of Respondent's Brief in Opposition. References to "(R. __)" are to the pages of the clerk's record on appeal to the appellate court of Illinois.

2/ *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *United Transp. Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971); *In re Primus*, 436 U.S. 412 (1978).

stated that petitioners could raise a First Amendment defense on remand,[3/] it conclusively determined that the coordination and encouragement of litigation to challenge discriminatory practices, activity protected under the First Amendment, could distinguish tortious from non-tortious conduct under Illinois malicious prosecution law. The Supreme Court of Illinois thus manifestly addressed and finally decided the federal constitutional issue raised here.

b. Respondent mistakenly contends that the Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review petitioners' First Amendment claim because in reversing the dismissal of the complaint, the Supreme Court of Illinois remanded the case for further proceedings and thus its judgment cannot be considered final. (Opp. 10-13.) That further proceedings may be contemplated at the trial court level, however, does not foreclose the Court's jurisdiction under 28 U.S.C. § 1257.

Although the requirement of finality "is not one of those technicalities to be easily scorned," *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945), the Court has taken a much more flexible and "'pragmatic approach,'" *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (quoting *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 486 (1975)), to the

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[3/] The First Amendment issue reserved for remand, under the analysis of the Supreme Court of Illinois, would turn upon whether or not the underlying lawsuits were brought with malice and without probable cause. *Cf. Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993). The First Amendment defense raised in this petition, however, was not reserved for remand, but was definitively rejected by the Supreme Court of Illinois: whether Illinois may distinguish between tortious and non-tortious litigation solely on the basis of coordination and encouragement of a series of lawsuits brought under civil rights antidiscrimination laws.

question of finality than CAN would have one believe. Recognizing that the concept of finality has acquired "a penumbral area," *Radio Station WOW*, 326 U.S. at 124, in which appealability is not necessarily limited to "the last order possible to be made in a case," *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964), "in practice the final judgment rule has not been interpreted so strictly." *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 306 (1989). Rather, the Court has long given the finality requirement a "'practical rather than a technical construction,'" *Construction Laborers* v. *Curry*, 371 U.S. 542, 549 (1963) (quoting *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949)), and has consistently ascribed finality to and reviewed state court judgments under § 1257 even where further proceedings are contemplated. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-85 (1975) (collecting and summarizing cases); *see also ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 611-12 (1989); *Duquesne Light Co.*, 488 U.S. at 306-07; *Goodyear Atomic Corp.*, 486 U.S. at 178-80.

This is particularly true where, as here, "these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Cox*, 420 U.S. at 477-78 (quoting *Radio Station WOW*, 326 U.S. at 124). As CAN itself acknowledges, the petition presents "the only federal issue in the case." (Opp. i). Thus, there is no danger of piecemeal review and the Court's assertion of jurisdiction would not "offend the decisive objection to fragmentary reviews." *Radio Station WOW*, 326 U.S. at 127.

Furthermore, here, as in *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963), review and determination of the First Amendment issue at this stage of the litigation would "serve[] the policy underlying the requirement of finality in 28 U.S.C. § 1257." Rather than subjecting the parties "to long and complex litigation which may all be for naught," *id.*, if consideration of the constitutional question were postponed,

resolution of the issue now could be preclusive of any further litigation.[4/] It was only as a result of the state supreme court's expansion of its definition of special damages to include the coordination and encouragement of a series of lawsuits challenging discriminatory practices that CAN's complaint was found to have alleged sufficiently the special damages necessary to state a claim of conspiracy to engage in malicious prosecution, the sole cause of action brought against petitioners. Consequently, if the state supreme court's decision were to be reversed, CAN's complaint would be required to be dismissed, as the trial and appellate courts concluded (Pet. 38a-40a; R. 18-19, 27-28; Pet. 28a-30a), and this prolonged litigation could be brought to an end. To postpone consideration, in contrast, would result in a remand for trial of CAN's claim, which, given the breadth of CAN's allegations, would require extensive and voluminous discovery and consume numerous time, energy, and resources, all of which might be for naught.

Indeed, for this reason, this case falls squarely within the fourth category of cases identified in *Cox* in which the Court has treated a judgment as final and taken jurisdiction without awaiting the completion of additional proceedings in the lower state courts:

> [W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of

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4/ *See also Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966) (finding that to postpone consideration of constitutional question would result in "roundabout process" that "would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets").

> the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 482-83 (citing *Construction Laborers*, 371 U.S. 542; *Mercantile Nat'l Bank*, 371 U.S. 555; *Hudson Distribs.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241(1974)).

Here, as discussed *ante*, the judgment of the Supreme Court of Illinois was "plainly final on the federal issue." *Cox*, 420 U.S. at 485. Moreover, although petitioners could prevail at trial on nonfederal grounds, reversal of the state supreme court's holding would be preclusive of further litigation.[5/] CAN's complaint would be required to be dismissed for failure to meet Illinois' special damages requirement. Finally, refusal to grant review to petitioners' claim would leave in effect the unreviewed decision of the state supreme court, which petitioners contend

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[5/] CAN argues that "it is by no means clear that *a decision on remand* in petitioners' favor on the First Amendment question 'would be preclusive of any further litigation' on CAN's cause of action" because Illinois could eliminate or redefine the special injury requirement. (Opp. 17) (emphasis added.) The question, however, as set forth in *Cox*, is not whether a decision *on remand* would be preclusive of further litigation, but whether the Court's reversal of the state court on the federal issue at this stage would be preclusive of further litigation, which is clearly the case here.

abridges and erodes their First Amendment rights. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989) (citing *National Socialist Party of America* v. *Skokie*, 432 U.S. 43, 44 (1977); *Miami Herald Publishing Co.*, 418 U.S. at 246-47)). Given that a decision on the merits of the only federal issue could terminate the litigation and an important First Amendment issue is at stake, the decision of the Supreme Court of Illinois on the federal issue should be considered a final judgment under 28 U.S.C. § 1257. *See, e.g., Fort Wayne Books*, 489 U.S. at 55-56 (holding that Court had jurisdiction to review First Amendment challenge to RICO statute even though further proceedings at state court level contemplated); *Goodyear Atomic Corp.*, 486 U.S. at 178-80 (concluding that case fell within fourth *Cox* exception where federal question concerning nuclear regulation finally determined by state supreme court and reversal would preclude further proceedings); *Cox*, 420 U.S. at 485-87 (finding jurisdiction over decision of state supreme court where First Amendment challenge to state statute and reversal on federal issue would terminate litigation).

c. Finally, respondent's reliance on *Jefferson* v. *City of Tarrant*, ___ U.S. ___, 118 S. Ct. 481 (1997), to support its contention that the Court lacks jurisdiction (Opp. 10-13), is misplaced. First, simply because the Supreme Court of Illinois remanded the case to the trial court for further proceedings does not divest the Court of jurisdiction. Rather, as demonstrated above, under circumstances such as presented here, the Court has consistently found finality and reviewed cases despite the ordering of further proceedings. Second, the facts in *Jefferson* underlying the Court's decision to decline jurisdiction are clearly distinguishable from those here. There, in a wrongful death action, plaintiff brought two state law claims and two federal claims under 42 U.S.C. § 1983. On an interlocutory appeal, the Alabama Supreme Court "answered a single certified question

that affected only two of the four counts in petitioners' complaint." *Id.* at 486. The state court concluded that the state wrongful death act governed plaintiffs' recovery on their § 1983 claims and remanded the case for further proceedings, including "a trial on the merits of the state-law claims." *Id.* Thus, in *Jefferson*, unlike here, reversal of the state supreme court's decision would not have terminated the litigation. Resolution of the federal issue was not determinative of petitioners' state law claims, which remained to be tried regardless of the outcome on the federal issue.

2. Not only is there no jurisdictional bar to review of the constitutional question presented, there is no bar on prudential grounds. The principles and considerations that underlie the Court's policy of judicial restraint in deciding constitutional questions are entirely absent in this case. *See Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J. concurring); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-575 (1947). This is not a case involving judicial review of a legislative act and thus there is no question of invading the province of coordinate branches of the government. Nor is it a case where the judgment can be sustained on an independent state ground. This is also not a case where there is a question regarding standing. Nor is it a case where a matter of state law remains unresolved or is ambiguous, or where further proceedings in state court would clarify the constitutional issue presented. Rather, the Supreme Court of Illinois definitively addressed and decided the constitutional issue petitioners raise here, which is "presented with clarity, precision and certainty." *Rescue Army*, 331 U.S. at 576. These circumstances are thus clearly distinguishable from those in *Rescue Army* and *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105 (1981), upon which CAN relies. *Cf. Minnick*, 452 U.S. at 127 (declining jurisdiction where further state proceedings were likely to affect the constitutional issues because of "significant developments in the law – and perhaps in the facts as well" and where there were "significant ambiguities in the record"); *Rescue Army*, 331 U.S.

at 575-84 (refusing to exercise jurisdiction where constitutional issues were presented in "highly abstract form," the state court's construction of the code provision in question was "ambiguous," and where Court believed that further proceedings would ultimately tender "the underlying constitutional issues in clean-cut and concrete form").

Additionally, although the First Amendment issue petitioners raise arises in the context of a state malicious prosecution suit, it is not, as CAN asserts, simply a matter "'peculiarly of local concern,'" (Opp. 18, quoting *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67 (1948)), any more than *Button* itself was a matter of local concern. *Republic Natural Gas* affected the regulation of gas production in a single state; this case concerns the rights of access to the courts and association for litigation purposes that are national in scope. Respondent's rule would effectively cut off Court review of virtually all state court litigation.

3. Finally, CAN's discussion of the merits of petitioners' First Amendment argument fails to address the constitutional question petitioners raise. CAN ignores two critical issues: 1) that in Illinois to maintain an action for malicious prosecution it is not enough to allege that the underlying action was brought without probable cause and with malice; a plaintiff must also allege special damages or special injury; and 2) that the Supreme Court of Illinois determined as a matter of law that a plaintiff could meet Illinois' special damages requirement where a defendant has coordinated and encouraged a series of lawsuits challenging discriminatory practices. Instead, in an attempt to turn the issue presented into a factual question, CAN focuses entirely on questions of probable cause and malice and contends that a trial is necessary to determine these issues. But the question petitioners raise is a strictly legal one. The issue is not whether petitioners brought the underlying cases with or without probable cause or with or without malice; it is whether Illinois can define its special damages requirement to include the encouragement and coordination of litigation to challenge

discriminatory practices and thus make the fact of having engaged in protected First Amendment activity the dividing line between tortious and non-tortious conduct. Because this question is a purely legal, not factual, one, it can certainly be determined at this stage in the litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Illinois should be granted.

Dated: New York, New York
February 24, 1998

Respectfully submitted,

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